IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 28, 2006 Session

STATE OF TENNESSEE v. JAMES R. THURMAN

Appeal from the Criminal Court for Meigs County
No. 3015 E. Eugene Eblen, Judge

No. E2005-00040-CCA-R3-CD - Filed October 13, 2006

The defendant was convicted of driving under the influence of an intoxicant, refusing to submit to a drug or alcohol test, evading arrest, and possessing an open container. The jury also levied a fine of $1,500 for evading arrest and $35 for possessing an open container. In a second deliberation, the jury set a fine for fourth offense driving under the influence (DUI). The trial court sentenced the defendant to two years for the DUI and eleven months and twenty-nine days for the evading arrest. The defendant was to serve 180 days in incarceration and the balance in community corrections. Immediately before the jury retired to deliberate, one of the jurors received word that her daughter had been rushed to the emergency room. The trial court excused the juror. While the jury was deliberating, the defendant's father brought to defense counsel's attention, that the State's prosecuting witness ate lunch at the same table as two jurors before the deliberation. The defendant moved for a mistrial on the basis of the witness/juror contact. The trial court denied the motion. The defendant now appeals arguing that the trial court erred in allowing an eleven-member jury verdict and in denying his motion for a mistrial. We affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which ALAN E. GLENN, and J. C. MCLIN, JJ., joined.

Randy G. Rogers, Athens, Tennessee, for the appellant, James R. Thurman.

Paul G. Summers, Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; James S. McCleun, District Attorney General; and Roger Delp and Frank Harvey, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

On June 8, 2001, at approximately 1:30 a.m., Deputy Parrish Brady of the Meigs County Sheriff's Department saw a vehicle swerving in the road. Deputy Brady followed the vehicle and

saw the vehicle drive in a questionable manner. At one point, the driver, who was the defendant, swerved into the oncoming lane of traffic and remained in that lane. At this point, Deputy Brady activated his blue lights. The defendant pulled off the road and went up a driveway behind a trailer home. The defendant then jumped out of the vehicle and ran towards the woods. Deputy Brady chased the defendant through the woods and told him to stop. When Deputy Brady got close to the defendant, the defendant turned around and acted like he was going to hit the deputy. Deputy Brady used pepper spray to subdue the defendant. He was then placed in handcuffs, arrested and taken to the Meigs County Jail.

As a result of this incident, the Meigs County Grand Jury indicted the defendant on March 25, 2002, for (1) driving under the influence of an intoxicant, (2) violating the implied consent law, (3) evading arrest, (4) violating the open container law and (5) fifth offense driving under the influence of an intoxicant.

A jury trial was held on August 20, 2003. The State presented Deputy Brady as its only witness in its case in chief and the defendant testified as his only witness in his case in chief. The State also presented a rebuttal witness, Richard Lawson, who was a corrections officer on duty the night the defendant was arrested at the Meigs County Jail. Following the close of proof, the trial court called a recess for lunch. After lunch, the jury returned, both parties completed their closing arguments, the trial court instructed the jury, and the jury retired for its deliberations.

Shortly after the jury began to deliberate, two issues arose regarding the panel. The Clerk's Office received a call that a child of a juror had been taken to the emergency room. The trial court allowed that juror to leave to attend to her child. Apparently, the eleven jurors resumed their deliberations. The defendant's attorney then went to discuss with his client whether the defendant would accept an eleven-member jury verdict. During this discussion, the defendant's step-father told the defendant's attorney that he saw Deputy Brady eating lunch at the same table as two clerks and members of the jury. This information was presented to the trial court.

This information led to a great deal of discussion on the record as to how to proceed. The defendant's attorney stated that his client was somewhat ambivalent about proceeding with an eleven-member jury. At one point, the defendant wanted to accept the eleven-member jury verdict, but then the question of the impropriety of the witness eating with the jury arose. The defendant's attorney stated that he and his client were concerned about waiving an issue about the eleven-member jury or witness contact with the jurors. The trial court, assistant district attorney and the defendant's counsel all debated the issues brought up by these questions. Ultimately, the defendant's counsel stated that the defendant would accept the eleven-member jury verdict. However, there was still further discussion about the possible waiver of the witness/juror contact issue. During this discussion, word came that the jury had concluded its deliberations. The trial court then brought the jury in to announce its verdict.

The jury found the defendant guilty of driving under the influence of an intoxicant, refusing to submit to a drug or alcohol test, evading arrest with an accompanying $1,500 fine, and possessing

an open container with an accompanying fine of $35. In a second deliberation to set the fine for fourth offense driving under the influence, the jury recommended a fine of $8,000.

The trial court then asked the jurors some questions regarding the conduct of Deputy Brady at the lunch recess. In addition, the State called Deputy Brady to testify regarding the lunch recess and the defendant called Bill Trew, his step-father, to testify regarding the lunch recess. Following the testimony, the defendant made a motion for a mistrial. The trial court denied the defendant's motion.

A sentencing hearing was held on April 26, 2004. At the conclusion of the hearing, the trial court sentenced the defendant to two years as a Range I Standard Offender on the DUI, eleven months and twenty-nine days, to serve thirty days on the evading arrest, and the fine of $35 recommended by the jury and no jail time on the open container violation. The trial court ordered that the sentences be run consecutively, with service of 180 days for the DUI and then 30 days for evading arrest at the Meigs County Jail and the rest on community corrections.

The defendant's motion for new trial was denied by the trial court, and this appeal ensued.

ANALYSIS

The defendant argues two issues on appeal: (1) whether the trial court erred in its handling of the jury issues when the defendant was requested to accept an eleven-member jury; and (2) whether the trial court erred in denying the defendant's motion for mistrial with regard to issues concerning jury sequestration. As noted earlier, there was a great deal of discussion between defense counsel, the defendant, the trial court and the assistant district attorney concerning whether the defendant would accept the eleven-member jury verdict. The following exchange occurred at the conclusion of the discussion:

> [Defense counsel]: Your Honor, my client – my client advises me, if this is acceptable, that he would accept an 11-man verdict if he's not waiving his right to put on proof here, and ask that a mistrial or a new trial be granted based on whatever the proof shows about that hearing. That he would not object to the 11-men issue because of the emergency with the juror. But that he doesn't want to waive his rights to develop the proof, and possibly ask for a mistrial in the event it was a verdict of guilty, because of that, if Your Honor found that what happened was significant.
>
> Asst. General Harvey: Your Honor, is the jury ready?
>
> Court Officer: They're advising they're done.
>
> Asst. General Harvey: Okay. Well, Your Honor, they're not out yet. We can take the proof. Take the proof and see.

The Court: Is that what you want to do?

[Defense Counsel]: That's fine. You want to have a hearing.

The Court: I want him to be sure he fully understands his rights and what he's waiving, because he -

[Defense counsel]: The question right now is will you take an 11-man verdict?

Defendant Thurman: I guess so.

[Defense counsel]: Okay. And we're going to have a hearing here about whether or not you should be granted a mistrial based on what happened at lunch. If the Judge finds that you should, he's just going to grant a mistrial, and we're not going to take the verdict. Is that correctly stated, Your Honor?

(No audible response.)

[Defense counsel]: Would you like to go talk to your dad about it a minute?

Defendant Thurman: No; just take the verdict.

[Defense counsel]: Okay. Take the verdict and reserve our right to have this hearing as to whether or not he should be granted a new trial.

The Court: Well, do you want to do this before we –

[Defense counsel]: I think that's what [the Assistant District Attorney] would -

The Court: Take the jury verdict?

Asst. General Harvey: I'm thinking we probably should.

Defendant Thurman: No. Just take the verdict, whatever they've got now.

[Defense Counsel]: Are you waiving the lunch deal?

Defendant Thurman: I suppose so.

[Defense Counsel]: It can't be a suppose. You either say yes or no.

Defendant Thurman: Yeah. It ain't right, but that's okay.

[Defense Counsel]: You just said it wasn't right, but it's okay?

The Court: Well, I can't accept that. I can't accept that under those circumstances-

[Defense Counsel]: You have to make a knowingly [sic] waiver-

The Court: I can't accept that under those circumstances, because I'm not going to allow you to do something you think is not right.

Defendant Thurman: An 11-man jury will be fine.

[Defense counsel]: And you're waiving any complaint about the lunch issue?

Defendant Thurman: Yeah.

[Defense Counsel]: You know you have a right to do that. Under the Constitution you've got some things to talk about, but you want to waive that and take your verdict and get the case over with?

Defendant Thurman: Yes.

The Court: Okay. Bring the jury in. The jury may have settled all of it any way.

Eleven-Member Jury

The defendant argues he was under pressure to make a decision concerning whether to accept a verdict rendered by an eleven-member jury and this fact deprived him of his right to a fair trial. The State argues that the defendant knowingly and voluntarily waived his right to a verdict by a twelve-member jury.

In State v. Ellis, 953 S.W.2d 216 (Tenn. Crim. App. 1997), this Court discussed the requirements for waiving a jury trial. The Court stated that Rule 23 of the Tennessee Rules of Criminal Procedure requires a written waiver. Ellis, 953 S.W.2d at 220. This Court went on to state, however, that a waiver will not be invalid absent a written waiver, "so long as the record 'clearly show[s] a voluntary relinquishment of the rights to be tried by a common law jury.'" Id. at 221 (quoting State v. Bobo, 814 S.W.2d 353, 359 (Tenn. 1991)). In addition, "it must appear from the record that the defendant personally gave express consent in open court." Id. (citing United States v. Taylor, 498 F.2d 390, 392 (6th Cir. 1974)). This Court also set out the "preferred practice" for waiving the right in open court when there is no written waiver which is "for the trial court to inform the defendant of his right to a trial by jury, the nature of the right, and the consequences of waiving it." Id. at 222. However, Rule 23 does not require that a trial court follow the preferred practice. Id. at 222.

The trial court did not follow the "preferred practice" as set out in Ellis. However, we find that the requirements for a valid waiver have been met considering that the trial court repeatedly asked the defendant if he would accept the verdict from an eleven-member jury. It is clear from the transcript that the defendant himself told the trial court that he agreed to accept the eleven-member jury verdict. Throughout the above exchange, the defendant never wavered on whether or not to accept the eleven member jury verdict. There was no indication from the record that the defendant did not understand the proceedings or the fact that he was waiving his right to a full jury.

In view of the fact that the trial court repeatedly asked the defendant if he would accept the verdict, the defendant's attorney agreed to accept the verdict, and there was no indication that the defendant did not understand the proceedings, we find a valid waiver of a twelve member jury.

Witness/Juror Contact

The defendant also argues that the trial court erred in denying the defendant's motion for mistrial based on the inappropriate witness and juror contact. The State argues that the defendant waived this argument at the trial level when he agreed to accept the eleven-member jury verdict. In the alternative, the State argues that the trial court did not err in denying the defendant's motion for mistrial.

Contrary to the State's argument, we fail to see how agreeing to accept an eleven-member jury waived the right to have that jury reach its verdict free from extraneous influence if such occurred

When there is inappropriate contact between a witness and a juror and the jury is sequestered, the State has the burden of showing that no prejudice occurred. Gonzales v. State, 593 S.W.2d 288, 291-93 (Tenn. 1980). However, in State v. Blackwell, 664 S.W.2d 686 (Tenn. 1984), our supreme court stated that when the issue involves an unsequestered jury particularly in a misdemeanor case such as the one sub judice:

> [S]omething more than a bare showing of a mingling with the general public is required where the jury is not sequestered to shift the burden of proof to the State of showing no prejudice. That additional requirement is that as a result of a juror's contact with a third person some extraneous prejudicial information, fact or opinion, was imported to one or more jurors or some outside improper influence was brought to bear on one or more jurors.

Blackwell, 664 S.W.2d at 689.

After the announcement of the jury verdict, the trial court asked the jurors some questions about their lunch. He asked if anyone noticed Deputy Brady walking behind them to the restaurant or sitting at the table with the clerks of the court. No jurors acknowledged that they saw Deputy Brady walking behind them to the restaurant. Two jurors stated that they did see Deputy Brady at the table. They also stated that he did not have any influence on them while at the table.

The State then called Deputy Brady to testify regarding his behavior during the lunch recess. He stated that he did not speak to any of the jurors, and he walked about fifteen to twenty feet behind the jurors both to and from the restaurant. He had paperwork from the case with him, but he did not open the file at any time during lunch. Deputy Brady also stated that he did not speak to or assist the jurors in any way. In addition, he did not speak about the case to anyone in the restaurant. The two clerks sat between him and the jurors.

The defendant's attorney called Bill Trew, the defendant's step-father, who first reported that Deputy Brady sat at the same table as the jurors. Mr. Trew stated that he saw the deputy sitting with the clerks of the court and the jurors. He could not hear their conversations. Mr. Trew also stated that the deputy had some paperwork with him, but did not open it up. On cross-examination, he admitted that it was not unusual for parties to share tables at the restaurant where everyone had lunch.

At the conclusion of this testimony, the defendant moved for a mistrial. The trial court made a ruling from the bench:

> Well, I think the controlling factor, of course, was the jury. And when none of them knew that he'd walked down there in any proximity to them, and only two of them knew that he was at a table, and all of them acknowledged that there was nothing said. He had not even spoken to any of them. But I do understand the concern, because he was there in the area they were. He should not have been there. But I don't think that rises to the – in this situation that it rises to the circumstance of declaring a mistrial. So overrule your motion for a mistrial.

The decision whether to grant a mistrial is within the discretion of the trial court and that decision will not be disturbed on appeal unless there was an abuse of discretion. State v. Reid, 91 S.W.3d 247, 279 (Tenn. 2002); State v. Smith, 871 S.W.2d 667, 672 (Tenn. 1994). Moreover, the burden of establishing the necessity for a mistrial lies with the party seeking it. State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). "The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict." Id. Generally, a mistrial will be declared and the jury discharged in a criminal case only if there is "manifest necessity" requiring such action by the trial judge. State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991) (quoting Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977)).

The defendant did not show that "some extraneous prejudicial information, fact or opinion, was imported to one or more jurors or some outside improper influence was brought to bear on one or more jurors." Blackwell, 664 S.W.2d at 689. The contact between the witness and the jurors did not involve any conversation according to the jurors and Deputy Brady. Mr. Trew stated that he was too far away to determine if there was any conversation, or hear a conversation if one was had. For this reason, the defendant has not met his burden under Blackwell of showing that the jury received any extraneous information about the case. Therefore, we determine that the trial court did not abuse its discretion in denying the defendant's motion for a mistrial.

Therefore, this issue is without merit.

CONCLUSION

For the foregoing reasons, we affirm the judgments of the trial court.

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JERRY L. SMITH, JUDGE